

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

74-2147

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT
DOCKET No. 74-214

HARRY ERNEST RUBENS and JEANNE RUBENS,

Plaintiff-Appellants,

—v.—

NEW YORK STOCK EXCHANGE, INC., KIDDER PEABODY & CO.,
INC., MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.,

Defendant-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**BRIEF FOR DEFENDANT-APPELLEE
MERRILL LYNCH, PIERCE, FENNER & SMITH
INCORPORATED**

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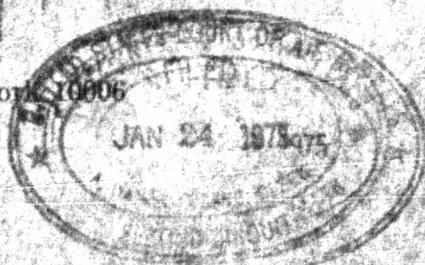


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Preliminary Statement

Plaintiff-Appellants appeal from a final judgment entered in the United States District Court for the Southern District of New York, pursuant to a memorandum and order of the Honorable Charles L. Brieant, Jr., dated July 16, 1974, which granted summary judgment to all defendants.

Question Presented

Does a customer have a claim against his broker for interest charged on a short sale "against the box" although the broker has theretofore voluntarily reimbursed the customer for such interest charges?

Statement of Facts

The plaintiffs have sued Merrill Lynch, Pierce, Fenner & Smith Incorporated ("Merrill Lynch"), Kidder Peabody & Co., Inc. ("Kidder") and the New York Stock Exchange, Inc. (the "Exchange") in an after-the-fact attempt to vindicate their theories concerning how certain sales of securities "against the box" should have been handled.

Plaintiffs maintained securities accounts with Merrill Lynch. On or about June 27, 1968 the plaintiffs ordered Merrill Lynch to execute a short sale "against the box" of 3,000 shares of common stock of Great Western Financial Corporation ("Great Western") (158a, 224a). That is to say, the plaintiffs deposited with Merrill Lynch 3,000 shares of Great Western which they already owned and instructed Merrill Lynch to borrow and sell short 3,000 other shares of Great Western for their account, thereby leaving plaintiffs with offsetting long and short positions in that security (158a, 224a). Defendant Merrill Lynch carried out this order, executed the short sale, and held the 3,000 shares which the plaintiffs deposited as collateral for the loan of the securities used to carry out the short sale (159a, 224a). Plaintiffs maintained this short against the box position from June 27, 1968 until January 21, 1970.

The transaction was entirely successful for the plaintiffs, inasmuch as it allowed them to postpone for two

calendar years any taxable gain which they would otherwise have realized on an ordinary "long" sale of their Great Western stock, and because it also protected them against the loss which would have resulted from a subsequent decline in the market value of their Great Western stock (159a, 165a, 224a).

Merrill Lynch charged the plaintiffs interest on the cash it was required to deposit with the lending broker in respect of the 3,000 shares which it had to borrow to effect delivery on the plaintiffs' short sale. Such charging of interest is sanctioned by custom and usage of long standing (160a), as the District Court found (224-225a). Plaintiffs could have avoided or terminated such interest charges at any time by closing out their short against the box position, but they chose to maintain that position for a year and a half.

Merrill Lynch sent the plaintiffs monthly statements of their account accurately reflecting their short against the box position and the interest charged (194-222a) and they accepted these statements without complaint until January 19, 1970, when they were ready to close out their position. On that date, Mr. Rubens wrote to Merrill Lynch requesting an explanation for the interest charges (163a). Merrill Lynch provided such explanation (165a) and, on its own initiative, refunded all of the interest charges which had been made in connection with the short sale (169-173a). Merrill Lynch reimbursed plaintiffs for the interest after giving Mr. Rubens the benefit of the doubt that he "did not fully understand" the entire transaction (169a). Mr. Rubens acknowledged receipt of the refund on September 30, 1970 (174a) and Merrill Lynch believed the matter was settled (174a) until it was served with the summons and complaint in this action on or about August 16, 1973.

In addition to plaintiffs' transactions with Merrill Lynch described above, plaintiffs executed similar short sales against the box in their account at Kidder. However, there are two main factual differences between the positions of Merrill Lynch and Kidder:

1) The plaintiffs had submitted their dispute with Kidder to arbitration before the Exchange prior to the institution of this action, and that arbitration resulted in an award in favor of Kidder. There was no arbitration between the plaintiffs and Merrill Lynch.

2) Merrill Lynch repaid to the plaintiffs all of the interest charges which it had made against the plaintiffs' short against the box position. Merrill Lynch therefore claims that such repayment removes any possible issue of fact between it and the plaintiffs and leaves the plaintiffs with no claim for damages.

This Action

On August 15, 1973 plaintiffs commenced this action in the United States District Court for the Southern District of New York (1a). The complaint alleges that Merrill Lynch and Kidder, by collecting interest charges on customer debit balances and by circulating Customer Agreements with arbitration provisions, violated the anti-fraud sections of the Securities Exchange Act (1-10a). It further alleges that the Exchange "conspired to permit" such violations (6-10a).

By order of October 9, 1973 this action was stayed, pending a determination of the arbitration between plaintiffs and Kidder (99-101a). Following an arbitration award in favor of Kidder, it moved for summary judgment and, by order of March 18, 1974, the complaint against Kidder was

dismissed (144-152a). Merrill Lynch then moved for summary judgment and, by order of July 16, 1974, the complaint against Merrill Lynch and the Exchange was dismissed (223-225a). Final judgment as to all defendants was then entered.

The District Court dismissed the complaint against Merrill Lynch on the ground that the interest charges had been returned to the plaintiffs by Merrill Lynch, on the ground that such charges were "sanctioned by custom and usage of long standing", and on the ground that the "'short against the box' was carried out in a proper manner" by Merrill Lynch (224-225a).

A R G U M E N T

P O I N T I

Plaintiffs Failed to Allege Any Claim Against Merrill Lynch.

In their brief to this Court, the Plaintiffs cite no authority to support any claim against Merrill Lynch. Plaintiffs have no claim because their short sale against the box was handled in a proper manner, and furthermore because Merrill Lynch, prior to the institution of this action, voluntarily credited plaintiffs' securities accounts with the total amount in dispute (169a). Plaintiffs were charged interest on their short sale in the amount of \$1,322.04 and were subsequently credited \$1,321.87 by Merrill Lynch (192a). The discrepancy of seventeen cents was the result of an arithmetical error (192a) and is *de minimis*.

Payment of the amount in dispute eliminates any issue of fact in a case and entitles the party making such pay-

ment to summary judgment under Rule 56, F.R. Civ. P. See *Bushman Construction Co. v. Air Force Academy Housing, Inc.*, 327 F.2d 481 (10th Cir. 1964). Even if a debt is substantial and clearly owed, a party is denied any relief other than full payment of that debt. See *Chandler v. State Highway Board of Georgia*, 61 F.2d 601 (5th Cir. 1932).

Plaintiffs in this action appear to have a theory about how short against the box transactions should be handled. They have persisted to press this theory against two brokers despite repayment of all charges by one and an arbitration award in favor of the other. Plaintiffs' pursuit of their theory, despite the absence of any justiciable case or controversy against any of the defendants, constitutes an abuse of the processes of both the District Court and this Court. Pure theory can not create an issue of fact, as the District Court correctly decided.

POINT II

Plaintiffs Are Bound by the Monthly Statements of Their Account.

From July of 1968 until the closing of the short sale, the monthly statements which the plaintiffs received from Merrill Lynch reflected the interest charges made on their short position. Despite their receipt of such monthly statements for one and one-half years, plaintiffs made no complaint concerning the interest charges until January 19, 1970, when they were ready to close out their position (163a).

When a statement of a person's account is rendered and such person keeps the statement and makes no objection

to it within a reasonable time, his silence constitutes an admission of the validity of the statement and he is bound thereby. *Rodkinson v. Haecker*, 248 N.Y. 480, 162 N.E. 493 (1928). When a monthly statement reflecting monthly charges is not complained of until one year later, the person receiving the statement is bound by it and all subsequent statements reflecting the same type of charge. *Steingart Associates, Inc. v. Sandler*, 28 A.D.2d 801, 280 N.Y.S.2d 1012 (3rd Dept. 1967).

Plaintiffs sought and received all the benefits of their short sale against the box before making any complaint to Merrill Lynch. These benefits were substantial. They postponed any recognition of gain on their Great Western holdings from 1968 until 1970, while they protected themselves against a decline in the market value of their 3,000 shares from \$23 to \$19 per share (159a). Having accomplished this much, they began to complain only when they were ready to close out their position by purchasing 3,000 shares to cover their short sale.

Such duplicity should not be tolerated. Having accepted the benefits of a transaction, they should not be permitted to escape the costs involved. Even if Merrill Lynch had not reimbursed all interest charged to the plaintiffs, they would still have no claim against Merrill Lynch.

CONCLUSION

The judgment of the District Court should be affirmed by this Court.

Dated: New York, New York
January 24, 1975

Respectfully submitted,

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